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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD  
IN OPPOSITION

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A-1 to A-42) is reported at 561 F. 2d 293. The opinion and orders of the Civil Aeronautics Board (Pet. App. B-1 to B-78, C-1 to C-46), and the initial decision ("I.D.") of the Administrative Law Judge are not yet reported.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. I) was entered June 23, 1977. A petition for rehearing and petition for rehearing *en banc* and a motion for stay were denied August 2, 1977 (Pet. App. F, G, H). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

### QUESTION PRESENTED

Whether the court of appeals unduly restricted the scope of the Civil Aeronautics Board's discretion to control its proceedings by affirming the Board's determination that competitive nonstop air carrier service was required on the Miami-Los Angeles route, but remanding the record for further consideration concerning selection of the carrier to provide that service.

### STATUTE INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth at Pet. App. J-1 to J-4.

### STATEMENT

In August 1972, the Civil Aeronautics Board instituted the *Miami-Los Angeles Competitive Nonstop Case* to consider whether the public convenience and necessity required the authorization of nonstop service in competition with National Airlines between Miami and Los Angeles and, if so, which carrier should be certificated to provide the service. C.A.B. Order 72-8-95. Nine carrier applications for competitive nonstop authority were consolidated into the proceeding.

The Administrative Law Judge ("ALJ") determined, following evidentiary hearings, that competitive service was required because (1) traffic levels were sufficient to permit profitable competitive service, (2) competition had been authorized in every other market of comparable size in the country, and (3) the monopoly service provided by National in the market had been deficient (I.D. 19-22). He recommended that Pan American World Airways be selected to provide the service because, among other

reasons, its strong international route system would enable it to obtain more "beyond-segment" traffic than other carriers (I.D. 96).<sup>1</sup>

After issuance of the ALJ's decision, the Board, at National's urging, deferred further proceedings for 18 months pending completion of a study of the environmental consequences of competitive service (Pet. App. A-8 to A-9).

The Board resumed proceedings in 1975 but, because two years had elapsed since the record had been developed, it updated the record by taking account of the most recent traffic data. On this basis, the Board affirmed the ALJ's determination that competitive service was needed on the route. It found that the traffic data compiled since the close of the hearing fully confirmed the ALJ's findings and conclusion favoring competition (Pet. App. B-6 to B-19). However, it selected Western Air Lines rather than Pan American to be National's competitor (Pet. App. B-25 to B-42; C-22 to C-44).

The Board found that "substantial alterations in Pan American's route structure and service patterns" occurring since the close of the hearings had "fatally undermine[d]" Pan American's ability to provide sufficient beyond-segment traffic to support its proposed level of service (Pet. App. B-40).

On petitions for review, the court of appeals affirmed the Board's decision that nonstop competitive service was required between Miami and Los Angeles, but remanded for adversary proceedings concerning the recent developments considered by the Board in reaching its

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<sup>1</sup>A "beyond-segment" passenger is one who must utilize the route in question as part of a longer trip (Pet. App. A-34, n. 19).

decision to prefer Western over Pan American (Pet. App. A). (The court ruled, however, that the service by Western could continue during these proceedings (Pet. App. A-42).)<sup>2</sup>

The court recognized that necessary updating of the record can occasionally be "accomplished by an agency acting independently and informally, without resort to adversarial procedures" (Pet. App. A-28). It was persuaded, however, by a "combination of factors" (*ibid.*) that the Board's selective updating of the evidentiary record with respect to the comparative qualifications of Pan American and Western had been prejudicial and unfair to Pan American<sup>3</sup> (Pet. App. A-28 to A-42).

The court rejected National's claim that it had been prejudiced by the Board's consideration of new evidence regarding route competition. It found that on the facts of the case National had not been "injured in any way" by the Board's updating process (Pet. App. A-29, n. 15). The court said that National had not drawn its attention to

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<sup>2</sup>The court also disposed of other challenges to the Board's decision that are not pertinent to the present petition.

<sup>3</sup>The following factors persuaded the court that Pan American had been treated unfairly: (1) the delay between the initial and final decisions was substantial, and covered a period in which Pan American's route structure was substantially altered; (2) Pan American's route alterations and the Board's attendant adjustments to its estimates of beyond-segment traffic potential were influential in the Board's determination to select Western; (3) "plausible arguments" were put forward by Pan American to refute the Board's interpretation of the changed circumstances; and (4) the decisional significance attached to the diminished estimate of Pan American's beyond-segment potential was an apparent departure from the Board's earlier position that beyond-segment traffic should not be accorded significant weight in transcontinental route awards (Pet. App. A-28 to A-42).

any factors indicating that the procedures followed by the Board had caused the Board to ignore evidence that would have supported "a contrary outcome on the need for competition issue" (*ibid.*).

The court retained jurisdiction pending further Board proceedings on the carrier selection issue by remanding the "record" rather than the "case" (Pet. App. D-1 to D-2).<sup>4</sup>

#### ARGUMENT

National contends that the court of appeals erred because it (1) rejected National's claim that it had been prejudiced by the Board's procedures in updating the record on the competitive service issue; and (2) impermissibly restricted agency discretion by retaining jurisdiction and limiting the scope of the proceedings on remand to the question of carrier selection. Neither issue merits this Court's review.

1. The record updating condemned by the court concerned only the carrier-selection issue; it did not affect the validity of the Board's determination that competition was required in Miami-Los Angeles nonstop service. The two issues involved separate inquiries that required analysis of different factors and criteria. *Delta Airlines, Inc. v. Civil Aeronautics Board*, 442 F. 2d 730, 733 (C.A. D.C.). In remanding the carrier-selection issue, the court

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<sup>4</sup>Rule 13(d) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit (rev. August 1975) provides:

(d) *Remand.* If the record in any case is remanded to a court or agency, this court retains jurisdiction over the case.

If the case is remanded, this court does not retain jurisdiction, and a new Notice of Appeal or Petition for Review will be necessary if a party seeks review of the remand proceedings.

was primarily concerned with the validity of the Board's unilateral adjustments to the estimates of Pan American's beyond-segment traffic. Those adjustments had caused the Board to reject Pan American in favor of Western (Pet. App. A-28 to A-42). They had no bearing on the issue of whether the market needed competition.

The disposition by the court below is not inconsistent with the admonition of *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331, that an agency decision "not sustainable on the administrative record made" must be remanded for further consideration. Here, after a thorough review, the court of appeals found that the record sustained the Board's determination that competition was needed; remand on that issue was therefore unnecessary.

2. The court's disposition of the case has not unduly restricted the Board's discretion over the scope of the proceedings on remand. Because the court found it unnecessary to return the whole case to the Board, the only issue the Board was required to consider on remand related to the updating of the record on carrier selection.

In inviting comments from the parties on remand, the Board noted that "[t]he Court did not require a reexamination of the need for service question and we see no public need for it." CAB Order 77-9-62, p. 2 (September 16, 1977). This position is consistent with the Board's policy of declining to reopen issues other than those specifically remanded \*\*\* unless compelling public interest or other considerations are advanced for such reexamination." *St. Louis-Southwest Service Case*, 31 C.A.B. 377, 378.<sup>5</sup> On December 22, 1977, however, the Board, in a public meeting, instructed its staff to submit a proposed order that would, among other things, provide

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<sup>5</sup>For these reasons, National's reliance on *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (Pet. 16), is misplaced. There, this Court held that the court of appeals could not

for consideration of whether a third carrier should be authorized to offer nonstop competitive service on the Miami-Los Angeles route. Should the Board subsequently determine to reopen the record with respect to other issues, it may, to the extent necessary, apply to the court of appeals to broaden the terms of the remand. There is no reason to assume that the court would not give proper deference in that event to the Board's discretion to control the scope of its proceedings.<sup>6</sup>

#### CONCLUSION

The petition for a writ of certiorari should be denied. Respectfully submitted.

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prevent the FCC from consolidating a remanded broadcast-licensing application with two later-filed applications. Here, the court has not forbidden the Board to take any action the Board desires to take.

<sup>6</sup>The court's retention of jurisdiction in the circumstances of this case is consistent with Section 1006(d) of the Federal Aviation Act, 72 Stat. 795, as amended, 49 U.S.C. 1486(d), which confers exclusive jurisdiction on the court of appeals "to affirm, modify or set aside the order complained of, in whole or in part, and if need be to order further proceedings by the Board \*\*\*."